Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1624

In The
Supreme Court of the United States
October Term, 1984

A. H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT E. MANCHESTER
GEOFFREY W. CRAWFORD
JEROME F. O'NEILL
(Counsel of Record)
MANCHESTER & O'NEILL, P.C.
95 St. Paul Street
P.O. Box 1459
Burlington, VT 05402
(802) 658-7444

BRADLEY POST
POST, SYRIOS & BRADSHAW
204 Occidental Plaza
300 North Main
Wichita, KS 67202
(316) 267-6391

DOUGLAS E. BRAGG
BRAGG & DUBOFSKY
First National Bank Building
Suite 2200
621 Seventeenth Street
Denver, CO 80293
(303) 292-2320

BEST AVAILABLE COPY

QUESTION PRESENTED

Does 28 U.S.C. § 455(a) require disqualification of a United States district judge with long experience in supervising the Dalkon Shield IUD multidistrict proceedings who submits an affidavit to assist the Judicial Council for the Eighth Circuit in a disciplinary proceeding brought by petitioner A. H. Robins Company, Inc. against another district judge?

PARTIES IN THE TENTH CIRCUIT

A.H. Robins "Dalkon Shield" IUD Products Liability Litigation

A.H. Robins Company, Incorporated

The Honorable Frank G. Theis, United States District Judge For The District of Kansas

Note: Counsel for plaintiffs in the multidistrict proceedings pending in the District of Kansas designated MDL-211 opposed the petition for writ of mandamus addressed to the Tenth Circuit and appear as respondents before this Court to oppose the petition for writ of certiorari.

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
PARTIES IN THE TENTH CIRCUIT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I. NO BASIS EXISTS FOR THE GRANT OF CERTIORARI IN THIS CASE	5
II. NO GROUNDS ARE PRESENT FOR THE DISQUALIFICATION OF JUDGE THEIS	6
CONCLUSION	10
APPENDICES	App. 1
Appendix A: Opinion and Order dated April 8, 1985 entered in In Re: A.H. Robins Company, Inc. "Dalkon Shield" IUD Products Liability Litigation, MDL Docket No. 211 (D.Kan.).	App. 1

TABLE OF AUTHORITIES

Pages

CASES

Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974) 5

Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) 5

Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984) 3

Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 565, — L.Ed. 2d — (1984) 8

United States v. Coven, 662 F.2d 162 (2d Cir. 1981), *cert. denied,* 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed. 2d 176 (1982) 7, 8

United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966) 7

Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505, 38 L.Ed. 2d 511 (1973) 5

STATUTES

28 U.S.C. § 455(a) ..... *passim*

RULES AND REGULATIONS

Rule 17.1(a), Supreme Court 5

Code Of Judicial Conduct For United States Judges, 69 F.R.D. 273 (1975) 9

LEGISLATIVE HISTORY

House Report No. 1453, 93d Cong., 2d Ses., reprinted in 1974 U.S. Code Cong. & Admin. News 6351 ..... 6, 7

No. 84-1624

In The

Supreme Court of the United States

October Term, 1984

A. H. ROBINS COMPANY, INCORPORATED,

Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unreported Order of the Tenth Circuit dated March 15, 1985, denying the petition of A.H. Robins Company, Incorporated for a writ of mandamus appears as Appendix A to petitioner's brief.

The Opinion and Order of Judge Frank G. Theis of the District of Kansas dated February 1, 1985, denying petitioner's motion to disqualify is also unreported and appears as Appendix B to petitioner's brief.

JURISDICTION

Respondents agree with petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

Since 1970 when petitioner A.H. Robins Company, Incorporated first marketed the Dalkon Shield intrauterine contraceptive device, more than 10,000 women from the United States and abroad have made claims against petitioner and other defendants for pelvic infection, sterility, septic abortion, and in some instances death caused by the device. Following the appointment in 1975 of Judge Frank G. Theis of the District of Kansas as the multidistrict litigation transferee judge, extensive pre-trial discovery and preparation of the federal Dalkon Shield cases have been conducted in multidistrict proceedings designated MDL-211 and captioned *In Re: A.H. Robins Company, Inc. "Dalkon Shield" IUD Products Liability Litigation.*

On January 10, 1985, petitioner moved to disqualify Judge Theis from further participation in MDL-211. In an Opinion and Order dated February 1, 1985, Judge Theis denied this motion. Judge Theis' decision is set out as petitioner's Appendix B. Thereafter petitioner sought a writ of mandamus from the United States Court of Appeals for the Tenth Circuit compelling recusal of Judge Theis. By Order dated March 15, 1985, the Tenth Circuit denied the petition for mandamus without opinion. Petitioner now seeks a writ of certiorari to obtain review of the denial of the petition for mandamus.

Other actions taken by petitioner establish the context for its motion to disqualify and the petition for mandamus. On October 22, 1984, petitioner filed a motion for class action certification of all Dalkon Shield punitive damage claims in an action pending in the Eastern District of Virginia. *In re: Dalkon Shield Punitive Damages*

Litigation, Civil Action No. 84-0884-R (E.D.Va.). On January 18, 1985, petitioner filed a motion before the Judicial Panel on Multidistrict Litigation to transfer the multidistrict proceedings from the District of Kansas to the Eastern District of Virginia. At present the class action and transfer motions are still pending and pre-trial proceedings before Judge Theis in MDL-211 are continuing.

The petition for mandamus arose out of an affidavit which Judge Theis submitted in July 1984 to the Judicial Council of the Eighth Circuit in connection with charges of judicial misconduct brought by petitioner and certain of its officers and employees against Chief Judge Miles W. Lord of the District of Minnesota. The text of the affidavit is set forth in petitioner's Appendix C. Petitioner's charges involved oral remarks and other actions taken by Judge Lord in connection with the settlement of a group of Dalkon Shield cases then pending in the District of Minnesota. These proceedings terminated without a decision following a ruling favorable to petitioner in its simultaneous direct appeal to the Eighth Circuit. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). Judge Lord described some of the difficulties he experienced in obtaining full discovery from petitioner in *Dean v. A.H. Robins Co.*, 101 F.R.D. 21 (D.Minn. 1984).

In his affidavit, Judge Theis outlined the history and purpose of the multidistrict proceedings. He advised the Judicial Panel that he had reviewed reports prepared by the Special Masters supervising discovery in cases pending before Judge Lord in the District of Minnesota. Judge Theis concluded that on the basis of these reports "[i]t would appear to me that representations made to me con-

cerning the completeness of discovery during the MDL proceedings are open to serious question. While there may possibly be explanations and justifications, this does not appear in any of the materials that have been furnished to me." Theis Affidavit, para. 7, Petitioner's Appendix C, p. 22a.

The affidavit concludes with some observations about the petitioner's repeated use of dilatory tactics to obstruct the MDL discovery proceedings and about the role of the federal judiciary in speaking out against any inhibition of the judicial process. "The frustrations and confusion which I have at times experienced in the eight years I have been shepherding this discovery appear to have been part of a pattern of that which occurred before Judge Lord. I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court." Theis Affidavit, para. 8, Petitioner's Appendix C, p. 23a.

Charges concerning the withholding of documents and other alleged discovery abuses for which petitioner is responsible are presently before Judge Theis. On December 13, 1984, MDL-211 plaintiffs filed a motion for sanctions against petitioner. In an initial ruling dated April 8, 1985, Judge Theis ruled that plaintiffs had established a prima facie showing sufficient to meet the crime or fraud exception to the attorney-client privilege. A copy of this decision is attached hereto as Appendix A. Further investigation into these issues is currently taking place in the MDL-211 proceedings.

REASONS FOR DENYING THE WRIT

I. No Basis Exists For A Grant Of Certiorari In This Case.

Petitioner rests its petition on the authority of this Court under Rule 17.1(a) of the Rules of the Supreme Court to review cases in which the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The Court has traditionally exercised its supervisory power to guide the lower courts on issues of general application and significance. See *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974) (application of doctrine of pendent jurisdiction); *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) (amount in controversy requirement in class actions) and *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (definition of attorney work-product rule in discovery).

The Court's supervisory authority has never required it to intervene whenever a party alleges error by the trial judge in the course of pre-trial proceedings. A mandamus petition or appeal to the Court of Appeals provides the proper setting for the final resolution of interlocutory disputes. That the Tenth Circuit panel which denied petitioner's mandamus petition saw no reason to issue a written opinion weighs heavily against the grant of certiorari.

While the present petition arises out of a unique factual setting, it raises no unusual legal issues. The interpretation of the statute involved, 28 U.S.C. § 455(a), is not in dispute among the circuits and the law con-

cerning judicial disqualification is not otherwise in question. Since the Tenth Circuit wrote no opinion, its decision carries no precedential weight. Petitioner seeks nothing more than a factual determination by this Court of whether under all the circumstances of this case, the district judge acted *reasonably* in denying petitioner's motion to disqualify. This Court has consistently denied certiorari in cases of this nature in which the issues are factual and the legal standard one of judicial discretion.

II. No Grounds Are Present For The Disqualification Of Judge Theis.

From the outset, petitioner has based its motion to disqualify Judge Theis solely on an alleged *appearance* of bias. It has specifically refrained from any claim of actual bias. The issue which petitioner seeks to bring before this Court, therefore, is whether the assistance lent by Judge Theis to the Judicial Council for the Eighth Circuit creates an appearance of impropriety sufficient to bar him from further participation in MDL-211. Judge Theis rejected this argument as, of course, did the Tenth Circuit in summarily denying the petition for a writ of mandamus.

Whether the decision of the Tenth Circuit is correct turns entirely on an understanding of the facts. In enacting 28 U.S.C. § 455(a) in its present form, Congress imposed a standard of reasonableness to be applied through the exercise of the discretion of the trial judge. "Disqualification for lack of impartiality must have a *reasonable* basis." H. Rep. No. 1453, 93d Cong., 2d Ses., reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355 (emphasis in original). Since ruling on a disquali-

fication motion calls for the exercise of judgment and discretion at the trial level, appellate review is limited in scope. "The issue of disqualification [on appeal] is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." H. Rep. No. 1453, 93d Cong., 2d Ses., reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

The facts of this case give rise to no reasonable apprehension of bias. As Judge Theis' affidavit demonstrates, he shared with the members of the Judicial Council his views of petitioner's conduct in order to explain the frustration which he and evidently Judge Lord had experienced in supervising discovery in the Dalkon Shield litigation. Judge Theis expressed no final conclusions on this subject and left the door open for any explanation petitioner might have for its conduct. The continuing multidistrict proceedings provide petitioner with every opportunity to rebut or alter the conclusions tentatively expressed in the Theis affidavit.

To provide grounds for disqualification the bias alleged must be personal—not judicial—in origin. This Court has long recognized that views formed in the course of judicial proceedings are not sufficient for mandatory recusal. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Facts learned by the court in the course of a different proceeding do not require disqualification. In *United*

States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982), the Second Circuit wrote that "[k]nowledge acquired by the judge while he performs judicial duties does not constitute grounds for disqualification." The Second Circuit noted that the judicial source of such information tended to dispel any appearance of impropriety under section 455(a). *Coven*, 662 F.2d at 168. See also *Katsaros v. Cody*, 744 F.2d 270, 283 (2d Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 565, — L.Ed.2d — (1984). The views which Judge Theis expressed are strictly judicial in origin and accordingly provide no grounds for disqualification. They stem from his experience in the multidistrict litigation and the difficulties he experienced in obtaining full disclosure from petitioner in discovery.

In an effort to inflate this case to proportions sufficient to justify the grant of certiorari, petitioner raises claims of *ex parte* contact. Judge Theis' so-called *ex parte* communications consist of a conversation with Judge Lord's counsel in the disciplinary proceedings and the review of Special Masters' reports prepared for the District of Minnesota. See Theis opinion denying disqualification, Petitioner's Appendix B, p. 13a. Receipt of the Special Masters' reports can hardly be characterized as an extrajudicial contact. The reports (like the initial telephone contact) did not come from any party to the litigation pending before Judge Theis. The reports were prepared in the context of an adversarial proceeding and were available to petitioner and the other parties in the case.

Petitioner seeks to characterize Judge Theis' role in the Eighth Circuit disciplinary proceedings as non-

judicial in nature. Nothing could be further from the truth. In his affidavit, Judge Theis spoke as a district judge in support and explanation of the conduct of a fellow judge who had experienced similar problems in dealing with petitioner in related litigation. The affidavit draws on Judge Theis' experience in the multidistrict litigation and is not personal or extrajudicial either in its motivation or in the factual basis for the views expressed.

Judge Theis breached no provision of the Code of Judicial Conduct. As the commentary to Canon 3 makes clear, contact between judges is not restricted. Code of Judicial Conduct, 69 F.R.D. 273, 275-76 (1975). By obvious analogy, findings of the designated Masters of other district courts may be reviewed without criticism. Judge Theis hardly engaged in "public comment" within the meaning of Canon 6. His affidavit, submitted solely to aid in the deliberations of the Eighth Circuit, found its way into the public record but not through any action by Judge Theis.

This case turns entirely on a discretionary judgment by the district court first, that his experience in the multidistrict litigation was of sufficient significance to the disciplinary proceedings pending before the Eighth Circuit, to require the submission of an affidavit and second, that submission of the affidavit did not subsequently require his disqualification. Such a case has not arisen before in the reported decisions and is not likely to recur. Petitioner failed to persuade either Judge Theis or the Tenth Circuit that the affidavit provided grounds for recusal and no public purpose would be served by the intervention of this Court in such a case.

CONCLUSION

The Respondents request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT E. MANCHESTER
GEOFFREY W. CRAWFORD
JEROME F. O'NEILL
(Counsel of Record)
MANCHESTER & O'NEILL, P.C.
95 St. Paul Street
P.O. Box 1459
Burlington, VT 05402
(802) 658-7444

BRADLEY POST
POST, SYRIOS & BRADSHAW
204 Occidental Plaza
300 North Main
Wichita, KS 67202
(316) 267-6391

DOUGLAS E. BRAGG
BRAGG & DUBOFSKY
First National Bank Building
Suite 2200
621 Seventeenth Street
Denver, CO 80293
(303) 292-2320

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

OPINION AND ORDER

The case is currently before the Court on plaintiffs' motion to compel production of five memoranda ("the Burke memoranda") and on plaintiffs' oral motion to incorporate an order issued by Magistrate John B. Wooley ("the Wooley Order") in *Goss et al v. A. H. Robins,* No. 81-1285, into the instant action. Defendant A.H. Robins contends that the Burke memoranda are protected by the attorney-client privilege and the work product doctrine. The memoranda, dated between 1976 and 1980, were addressed to regional, divisional and district managers and sales representatives of Robins and concerned the Dalkon Shield litigation. Robins notes that four of the memoranda were drafted by or under the supervision of attorneys retained or employed by Robins for the signature of John L. Burke, at that time the Robins Vice President to whom the recipients of the memoranda reported. The fifth memoranda was drafted under the supervision of Robins' general counsel, William A. Forrest, Jr., and bears both his and Burke's signatures. Robins claims that all five memoranda request information needed by counsel to defend Robins in litigation.

Plaintiffs initially argued that the memoranda are not protected from discovery because Burke is a sales

representative and not a lawyer. Plaintiffs extended their argument to contend that if the memoranda are subject to the attorney-client privilege or the work product doctrine, then the crime or fraud exception applies and makes the memoranda discoverable. Dk. no. 762. Thus, the issue of application of the crime or fraud exception is presently pending in the MDL.

The same five memoranda were the subject of discovery in five non-MDL cases, *Goss et al.* The parties argued the issue of discoverability before Magistrate Wooley, who issued an order on January 28, 1985, holding that the documents were discoverable under the crime or fraud exception. Plaintiffs have moved to incorporate the Wooley Order into the instant case. Because the Court is considering the same issue anew in the motion to compel, the motion to adopt the Wooley Order by reference shall be denied as repetitious.

The initial issue is whether to apply state or federal law to the attorney-client privilege and work product doctrine issues. Regarding privileges, Federal Rule of Evidence 501 directs the Court to apply the relevant state law. With respect to the work product doctrine, the Federal Rules of Civil Procedure are controlling. *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

Since Robins seeks to assert the attorney-client privilege and the work product doctrine as bars to discovery, it has the burden of establishing that they are applicable. *BarclaysAmerican Corp. v. Kane,* 746 F.2d 653, 656 (10th Cir. 1984). Robins has submitted the Burke memoranda for *in camera* inspection. Robins argues that the memoranda in question were prepared under the supervision of

counsel in anticipation of trial, were sent by counsel or counsel's representatives to Robins' employees, seek information in connection with ongoing litigation, and contain counsel's mental impressions, opinions and conclusions. Plaintiffs suggest that because the memoranda contain the signature of a sales representative they are not protected by either the attorney-client privilege or the work product doctrine. The Court disagrees. The memoranda in question are precisely the type of documents the United States Supreme Court recognized to be attorney-client communications in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). Similarly, since the memoranda were prepared in anticipation of litigation, the work product doctrine attaches. Fed. R. Civ. P. 26(b)(3).

Next, plaintiffs contend that if the documents are privileged, they lost their privileged status because of the crime or fraud exceptions to the work product doctrine and attorney-client privilege. Under Kansas law, the attorney-client privilege does not extend to "a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or tort." K.S.A. § 60-426(b)(1) (1983). The Tenth Circuit has set forth the standards governing consideration of the crime or fraud exception to the work product doctrine in *In Re Grand Jury Proceedings* (*Vargas*), 723 F.2d 1461, 1467 (10th Cir. 1983):

> The privilege does not apply where the client consults an attorney to further a crime or fraud. . . . Before the privilege is lost "there must be 'prima facie' evidence that [the allegation of attorney participation

> in a crime or fraud] has some foundation in fact." (Citations omitted.) . . . As this court held in its opinion *In re September 1975 Grand Jury Term,* 532 F.2d 734 (10th Cir. 1976), "[t]he determination of whether the [party] shows a prima facie foundation in fact for the charge . . . lies in the sound discretion of the trial court." *Id.* at 737.

Robins suggests that there is disagreement concerning whether the crime or fraud exception even applies to the work product doctrine. In its later opinion *In Re Grand Jury Proceedings* (*Vargas*), 727 F.2d 941, 946 (10th Cir. 1984), the Tenth Circuit clarified that its earlier *Vargas* opinion was intended to "set forth the standards to be employed by the trial court when determining the application of the crime or fraud exception to the attorney-client or work product privileges."

Robins is correct in noting that the attorney-client privilege is not destroyed when a client seeks advice about a past crime or fraud. *In Re Grand Jury Proceedings,* 604 F.2d 798, 802 (3d Cir. 1979). As Robins points out, a contrary rule would destroy the privilege when it is needed most. The threshold test is evident from the language of the statute: the legal advice must be "sought or obtained in order to enable or aid the commission or planning of a crime or tort." K.S.A. § 60-426(b)(1).

Robins appears to advance an argument that the plaintiffs' prima facie showing must include proof that Robins had constructed a fraudulent plan prior to consulting with its attorneys. The statutory language that the legal service must not be "obtained . . . to enable or aid" a crime or fraud does not preclude the circumstance in which the crime or fraud originates with the attorneys' advice or evolves from attorney-client interactions. Furthermore,

the statute clearly imports that if legal services are used to "aid the commission," in other words to cover up, a continuing crime or fraud, then the attorney-client privilege is lost.

The focal issue is whether the record reflects sufficient evidence to invoke the crime or fraud exception. The Court does not offer any opinion as to the truth of the facts asserted in the pleadings. At this juncture, the Court is concerned solely with applying the known facts to the plaintiffs' burden of establishing a prima facie showing of crime or fraud. Therefore, the conclusions reached in this opinion are limited to the purposes of this motion and do not reflect this Court's opinions about the merits of the case.

The Court has reviewed and examined all motions and attachments submitted by plaintiffs and by Robins with respect to this matter. In addition, the Court has reviewed the Amicus Curiae Brief in Support of Plaintiffs' Motion to Compel, Dk. no. 749, the Burke memoranda submitted for the Court's *in camera* inspection and all pleadings and Magistrate Wooley's Order in the *Goss et al.* cases. Furthermore, the Court brings its over nine years of experience with the multidistrict litigation to bear on the ruling in this matter.

Robins fears that the Court will engage in the reasoning that because Robins is accused of fraud and is defending against those accusations that the defense itself is a fraud and thus the privileges are lost. The Court agrees that such reasoning would be illogical. The Court would point out, however, that the plaintiffs' allegations are much different than this characterization. Plaintiffs sug-

gest that fraud is involved in Robins' defense of this litigation and that the fraud has extended to a cover up of initial acts of wrongdoing.

Attached to Plaintiffs' Second Supplemental Memorandum in Support of Motion to Compel Production is a report by Special Masters Peter N. Thompson and Thomas C. Batsch concerning waiver of the attorney-client privilege and the work product doctrine by Robins. The Masters examined over 15,000 pages of documents that were produced for *in camera* inspection. Further, the Masters were appointed specifically to monitor and assist with discovery in related Dalkon litigation in the United States District Court for the District of Minnesota. Although the Masters applied the Minnesota law of privilege to the facts before them, Minnesota law does not differ substantially from the law applied in the present case. In fact, the Minnesota law appears to be more stringent than the Kansas law regarding the crime or fraud exception: the Masters note that "courts have placed a heavy burden on the party opposing the claim of privilege to establish a *prima facie* case . . . ." *Hewitt v. A. H. Robins,* No. 3-83-1291 (Report (II) of the Special Masters) at 4 (D. Minn., *unpublished,* February 21, 1985).

In *Hewitt* and in the present case, plaintiffs allege that Robins has engaged in an ongoing scheme of knowing misrepresentation to the public concerning the effectiveness of the Dalkon Shield. Plaintiffs maintain that even after Robins stopped marketing the Dalkon Shield large numbers of women continued to use the product and the company continued to represent that the Shield was both safe and effective. In particular, the Masters refer to

Robins' reliance on a study by Dr. Hugh Davis to support the claim that the Dalkon Shield was effective in preventing pregnancy. The Masters note that "Robins' reliance on the Davis study . . . is questionable because it involved a predecessor product to the marketed Dalkon Shield." *Id.* at 13. Furthermore, with regard to studies by Drs. Earl, Ostergard and Gabrielson, which Robins used as promotional tools, the Masters determined: "Robins published and cited the studies to encourage sales when Robins knew that the results of the studies were inaccurate and misleading." *Id.* at 16. The Masters concluded:

> Defendant was well aware that pregnancy is associated with increased health risks, and that women, particularly women with pre-existing health problems, might choose, or be prescribed, the Dalkon Shield as opposed to another contraceptive to protect against exposure to the adverse health risks of pregnancy. Defendant subsequently was informed of a possible increased risk of septic abortion associated with pregnancies occuring with the Dalkon Shield in place. (See Dear Doctor Letter of 1974.) Thus, representations as to the efficacy or pregnancy rate of the Dalkon Shield reflect directly on the safety of the product. The allegation that a Drug Company would knowingly misrepresent to the public the safety characteristics of its product is a most serious allegation. In our view, such a serious allegation must be, *and in this case was,* carefully substantiated before concluding that a *prima facie* case of fraud has been established.

Id. at 17 (emphasis added).

For the purpose of their rulings on the attorney-client privilege and the work product doctrine, the Masters determined that the plaintiffs had established a strong prima facie case that Robins, with the knowledge and participation of counsel, engaged in an ongoing fraud by misrep-

resenting the safety and efficacy of the Dalkon Shield from 1970 to 1984:

> Plaintiffs maintain that the ongoing scheme to misrepresent to the public the nature and efficacy of the Dalkon Shield was perpetuated in a cover up phase at the direction of William A. Forest, Jr., Secretary and General Counsel. It is clear from the various depositions and exhibits that the legal department was closely involved in questions of labeling, marketing, product characteristics, dealings with the FDA, as well as litigation about the Dalkon Shield. Thus, it is a reasonable inference that corporate counsel was aware of the facts giving rise to the ongoing fraudulent scheme discussed above.

Id. at 18.

Finally, the Masters pointed to the decision in *Harre v. A. H. Robins,* 750 F.2d 1501 (11th Cir. 1985), in which the Eleventh Circuit concluded that a Robins' expert witness/consultant committed perjury, with complicity of counsel. The Masters stated, "We obviously do not rely on these decisions for our factual determinations in this matter, but they do tend to corroborate our finding of at least a *prima facie* case of a massive fraudulent scheme perpetuated on the public with the knowing assistance of members of the professional bar." *Id.* at 24.

In addition to the reports of the Special Masters, plaintiffs point to other evidence that Robins, with the assistance of counsel, conducted its affairs so as to cover up some aspects of its marketing, testing and advertising of the Dalkon Shield. The Amicus Curiae Brief, filed by Florida counsel Stephen Lindsey Gorman, points to discovery misconduct occurring in cases assigned to the Honorable Miles Lord in the United States District Court for

the District of Minnesota. Judge Lord conducted discovery proceedings and learned that numerous files which had been requested by plaintiffs were never produced by Robins. Judge Lord entered an Order, including the following finding:

> It is true that this has been a much discovered case for nearly a decade now. It is also true that the defendant has been subject to discovery conducted pursuant to the Multidistrict Litigation Proceedings. However, despite all of this previous discovery, the documents presently sought by plaintiffs have never been produced. *Indeed, defendant's counsel admitted that many of these sought after files have never been reviewed for nonprivileged material, notwithstanding the fact that the files likely contain information that would have been responsive to previous discovery requests.*

Dean et al. v. A. H. Robins, No. 3-83-1025 (D. Minn. *unpublished,* February 9, 1984). In his Order, Judge Lord required Robins to produce all documents concerning safety tests conducted on the Dalkon Shield. Robins filed a petition for writ of mandamus seeking review of Judge Lord's February 8, 1984 Order. On February 23, 1984, the Eighth Circuit Court of Appeals denied the petition for writ of mandamus. *In Re A. H. Robins Co., Inc.,* No. 84-5028 (8th Cir., *unpublished,* February 23, 1984).

Although Robins complains about the use of other proceedings as evidence of crime or fraud in the instant case, the Court finds Robins' procedural conduct in other cases to be relevant to the present motion. When the issue is whether Robins perpetrated a massive fraud to deceive the public, the cases across the country cannot be viewed as discrete and isolated instances.

In the present MDL proceedings, this Court conducted extensive discovery, including document production and depositions of Robins' employees. In August of 1981 and again in September of 1982, the Court reopened discovery proceedings when plaintiffs represented that much documentation existed that had not been produced During the course of the reopened discovery, many additional documents were produced.

For purposes of ruling on the present motion, the Court examined a wealth of evidence concerning document production in these and other proceedings. In light of the history of document production in the instant actions, the pleadings submitted by both parties, the amicus brief and attachments and the reports of the Special Masters, the Court concludes that plaintiffs have made a prima facie showing that Robins "sought or obtained [legal advice] in order to enable or aid the commission or planning of a crime or tort," *see* K.S.A. § 60-426(b) (1), and that the allegations of Robins' attorneys' participation in the crime or fraud have some foundation in fact. *See Vargas,* 723 F.2d at 737. Consequently, the attorney-client privilege and the work product doctrine have been lost to some extent.

The Court reemphasizes that this holding is limited to whether plaintiffs have made a threshold showing to sustain the crime or fraud exception to the attorney-client privilege and the work product doctrine. Once the threshold standard is met, evidence may be considered for discovery purposes if it will lead to other relevant evidence; the same standard does not apply to other stages of the proceedings. The Court's holding should not be read to

take any position regarding whether Robins or Robins' counsel have perpetrated a crime or civil fraud; the inquiry was targeted to whether the plaintiffs established that the Court should invoke the crime or fraud exception to the attorney-client privilege and the work product doctrine.

The final matter for the Court to determine is to what extent the attorney-client privilege and work product doctrine have been abandoned. Neither the Tenth Circuit nor the Kansas Supreme Court has addressed the extent to which the privileges are lost once the exception is established. The Eighth Circuit has required that the documents containing the work product "bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *In Re Murphy,* 560 F.2d 326, 338 (8th Cir. 1977). In *In Re International Systems and Controls Corporation Securities Litigation,* 693 F.2d 1235, 1243 (5th Cir. 1982), the Fifth Circuit held that the work product "must reasonably relate to the fraudulent activity." This Court believes that the prima facie showing of crime or fraud cannot open defendant's files completely or give plaintiffs carte blanche with respect to attorney-client communications. The Court holds that the memoranda in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime or fraud exception. Robins has submitted the Burke memoranda for *in camera* inspection. Given that the contents of the memoranda have a reasonable relation to the activities discussed above as evidence of crime or fraud, the Court finds that the Burke memoranda are discoverable by plaintiffs.

IT IS THEREFORE ORDERED that plaintiffs' motion to incorporate the Wooley Order into the instant proceedings is hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion to compel production of the Burke memoranda is hereby granted.

At Wichita, Kansas, on this 5th day of April, 1985.

/s/ Frank G. Theis

United States District Judge